

Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT:

JAY D. PATTON

Schroeder, Maudrell, Barbieri & Powers
Cincinnati, Ohio

ATTORNEY FOR APPELLEE:

ROBERT L. HOUSTON

Houston and Thompson, P.C.
Scottsburg, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

ARCH INSURANCE COMPANY,)

Appellant-Defendant,)

vs.)

COUNTY OF SCOTT,)

Appellee-Plaintiff.)

No. 40A01-0610-CV-437

APPEAL FROM THE JENNINGS CIRCUIT COURT

The Honorable Jon W. Webster, Judge

Cause No. 40C01-0605-PL-121

March 26, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant Arch Insurance Company (“Arch”) appeals the trial court’s denial of its Motion for Default Judgment and order of declaratory judgment that Arch has a duty to defend the Appellee-Plaintiff County of Scott (“the County”) in an underlying lawsuit against the County. We reverse and remand.

Issues

Arch raises three issues, which we consolidate and restate as:

- I. Whether the trial court erred in denying Arch’s Motion for Default Judgment; and
- II. Whether the trial court erred in issuing declaratory judgment that Arch has a duty to defend the County in an underlying lawsuit.

Facts and Procedural History

The undisputed facts are as follows: On October 11, 2005, Billy Richards (“Richards”) filed a complaint (“Richards Lawsuit”) against John Lizenby (“Sheriff Lizenby”), the Sheriff of Scott County, among others. Specifically, Richards alleges that on January 27, 2004, Sheriff Lizenby, by an agent, conducted a Sheriff’s sale of a tract of real estate in which Richards was the highest bidder. According to Richards, Sheriff Lizenby or his agent then resold the same real estate to Wells Fargo Home Mortgage, Inc. for \$61,945.95.

Arch issued the County an insurance policy in effect at the time of the Sheriff’s sale in question. On March 28, 2006, in Scott County Circuit Court, the County filed a complaint

for declaratory judgment against Arch,¹ alleging the policy issued by Arch obligates Arch to defend the County in the Richards Lawsuit because the Richards Lawsuit sought damages covered under the policy. On April 19, 2006, Arch filed, with attachments, its answer and a counterclaim for declaratory judgment alleging Arch had no duty to defend the County and that the policy does not cover the County in the Sheriff's sale of real estate. The attachments included a copy of the Richards Lawsuit complaint and the relevant portions of the Arch insurance policy. Additionally, Arch filed a Motion to Transfer Venue, which was granted to transfer the action to the Jennings Circuit Court.

Due to the County not timely filing its answer to the counterclaim, Arch filed a Motion for Default Judgment on Counterclaim with a supporting memorandum on May 24, 2006. Arch also filed a Motion for Judgment on the Pleadings, accompanied by a supporting memorandum. On June 12, 2006, the County filed its answer to the counterclaim, but did not file a response to Arch's Motion for Judgment on the Pleadings.

On September 7, 2006, the trial court held a hearing on the competing claims for declaratory judgment and Arch's pending motions. First, the trial court denied Arch's Motion for Default Judgment. Then the trial court received into evidence the relevant portions of the Arch insurance policy and the Richards Lawsuit complaint. On September 12, 2006, the trial court entered its order, granting the County's claim for declaratory judgment that Arch has a duty to defend the County in the Richards Lawsuit. The order, in part, read:

¹ The complaint for declaratory judgment also named Midwest Claims Service, Inc. ("Midwest") as a defendant. However, Midwest was dismissed pursuant to a stipulation of the parties and did not take part in

6. If [emphasis supplied] there was an impropriety in the Sheriff's Sale of January 27, 2004, it is, if anything, the violation of a statutory duty upon the Sheriff under IND. CODE §32-29-7-3(c) and/or 32-30-1-9(a) and for which he may have liability, if any, under the policy of insurance or his official bond, but there was no contractual relationship, express, implied, or otherwise between the Sheriff or Scott County, Billy Richards, or Wells Fargo.

Appellant's Appendix at 6. This appeal ensued.

Discussion and Decision

I. Motion for Default Judgment

First, Arch contends that the trial court erred in denying its motion for default judgment due to the County failing to file its answer to Arch's counterclaim. Our standard of review in the area of default judgments is limited. Progressive Ins. Co. v. Harger, 777 N.E.2d 91, 93 (Ind. Ct. App. 2002). The decision to grant or deny a motion for default judgment is within the trial court's discretion. Id. at 94. We reverse only if the trial court's decision is clearly against the logic and effect of the facts and circumstances. Id. The trial court's discretion in granting or denying a motion for default judgment is considerable. Id. "The trial court should use its discretion to do what is 'just' in light of the unique facts of each case." In re Marriage of Ransom, 531 N.E.2d 1171, 1172 (Ind. 1988).

The County does not contest that it filed its answer to the counterclaim after the twenty-day period. However, where a defendant fails to answer a complaint, even though there is a technical default, the nondefaulting party is not entitled to a judgment by default as a matter of right. Progressive Ins. Co., 777 N.E.2d at 95. A trial court determines whether to accept such pleadings by balancing the interests of speedy determination and unnecessary

this appeal.

delay against meritorious claim resolution. Dreyer v. Reinbold, Inc. v. AutoXchange.com, Inc., 771 N.E.2d 764, 769 (Ind. Ct. App. 2002), trans. denied.

Here, the contentions in the counterclaim simply assert that the insurance policy excludes coverage, including the duty to defend the Richards Lawsuit. No new issue was introduced into the litigation, just the request that declaratory judgment be entered in favor of Arch rather than the County. Both parties agree on the underlying facts. Ultimately, the interpretation and application of the insurance policy is the only dispute.

Default judgment is an extreme remedy and is available only where the party fails to defend or prosecute a suit. Allstate Ins. Co. v. Watson, 747 N.E.2d 545, 547 (Ind. 2001). It is not a trap to be set by counsel to catch unsuspecting litigants. Id. Under the circumstances presented, the trial court did not abuse its discretion in denying Arch's Motion for Default Judgment.

II. Duty to Defend

Second, Arch asserts that the trial court erroneously entered declaratory judgment in favor of the County and against Arch, concluding that the insurance policy covered the potential damages sought in the Richards Lawsuit and that Arch had a duty to defend the County in that action.

Initially, we note that the trial court's memorandum decision ordering Arch to provide a defense for the County does not constitute special findings of fact and conclusions of law under Trial Rule 52(A). See Smithers v. Mettert, 513 N.E.2d 660, 662 (Ind. Ct. App. 1987), reh'g denied, trans. denied. Rather the trial court's judgment is based on facts and documentary evidence to which both parties stipulated. When parties make such a

stipulation, we limit our review to whether the trial court correctly applied the law to the undisputed facts. Thus, our review is de novo. Gillespie v. GEICO General Ins. Co., 850 N.E.2d 913, 916 (Ind. Ct. App. 2006).

To determine whether Arch has a duty to defend the County in the Richards Lawsuit, we must first determine whether the alleged claim is covered by the insurance policy. The County argues that the trial court correctly determined that Arch has a duty to defend, because the facts alleged in the Richards Lawsuit complaint support a claim for breach of a statutory duty by Sheriff Lizenby in conducting the Sheriff's sale.

An insurer's duty to defend is broader than its coverage for liability or its duty to indemnify. Gallant Ins. Co. v. Oswalt, 762 N.E.2d 1254, 1259 (Ind. Ct. App. 2002), trans. denied. The duty to defend is determined from the allegations of the complaint and from the facts known or ascertainable by the insurer through reasonable investigation. Id. If the pleadings fail to disclose a claim within the coverage limits, or disclose one that is clearly excluded under the policy, and investigation reveals that the disclosed claim is outside the coverage of the policy, no defense is required. Id.

As noted by the trial court, the complaint in the Richards Lawsuit clearly states that it is an action under a theory of breach of contract against Sheriff Lizenby. The complaint makes no mention of Sheriff Lizenby's statutory duties in conducting a Sheriff's sale or an allegation that such duties were breached. Thus, the pleadings in the underlying action fail to disclose a claim for breach of a statutory duty. Moreover, no evidence has been designated by the parties to suggest that coverage for a statutory breach is covered by the policy of insurance. Thus, although the general facts of the sale may support an allegation that Sheriff

Lizenby breached his statutory duty, the language of the complaint does not state such a claim. Therefore, Arch's duty to defend can be triggered only if the claim for breach of contract is covered by the insurance policy.

The record contains three sections of the insurance policy that the parties believe may be applicable: Public Officials Liability Coverage, Law Enforcement Coverage and General Liability Coverage. Under Indiana law, an insurance contract is subject to the same rules of interpretation as other contracts. Town of Orland v. National Fire & Cas. Co., 726 N.E.2d 364, 370 (Ind. Ct. App. 2000), reh'g denied, trans. denied. If its language is clear and unambiguous, it should be given its plain and ordinary meaning. Id. However, if ambiguity exists, we must construe the language strictly against the insurer. Id. The policy is ambiguous only if reasonably intelligent persons may honestly differ as to the meaning of the policy language. Id.

We first look to the Public Officials Liability Coverage to determine whether an alleged claim of breach of contract would be within the coverage of the policy. Under the exclusions section of the Public Officials Liability Coverage, the following exclusion is listed:

This insurance does not apply to and WE shall not be obligated to make any payment nor to defend any SUIT against the INSURED:

For any LOSS arising as a consequence of the failure, refusal, or inability of the INSURED to enter into, renew, or perform any oral, written or implied contract or agreement between the INSURED and any other person, except any oral, written or implied contract relating to that persons [sic] employment by the INSURED.

App. at 77, 79. Based on this exclusion, the Richards Lawsuit action under the theory of

breach of contract is not within the Public Officials Liability Coverage provided by Arch to the County.

We now turn to the Law Enforcement Coverage and the General Liability Coverage portions of the insurance policy. The Law Enforcement Coverage provides:

WE will pay those sums that the INSURED becomes legally obligated to pay as DAMAGES because of a WRONGFUL ACT(S) to which this insurance applies. This insurance applies only to WRONGFUL ACT(S) that take place during the POLICY PERIOD and within the POLICY TERRITORY. The WRONGFUL ACT(S) must arise out of the performance of the INSURED'S LAW ENFORCEMENT ACTIVITIES ^[2] or out of the ownership, maintenance or use of premises designated in the Declarations . . .

App. at 59. Wrongful act is defined as:

[A]ny actual or alleged act, error or omission, neglect or breach of duty by the INSURED while conducting LAW ENFORCEMENT ACTIVITIES that results in:

1. PERSONAL INJURY; or
2. BODILY INJURY; or
3. PROPERTY DAMAGE.

Id.

The General Liability Coverage has a similar provision for the coverage provided:

We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which this insurance applies.

App. at 27. Of the possible types of resulting damage, the Richards Lawsuit, proceeding under the theory of breach of contract, could only possibly allege property damage. Property damage is defined in the Law Enforcement Activities Coverage as:

1. Physical injury to or destruction of tangible property, including all resulting

² Law Enforcement Activities is defined broadly in the policy as those activities conducted by the County's law enforcement department.

- loss of use of that property. All such loss of use shall be deemed to take place at the time of the physical injury that caused it; or
2. Loss of use of tangible property that has not been physically injured or destroyed, but only if such loss took place at the time of a WRONGFUL ACT.

App. at 59. An almost identical definition is used in the General Liability Coverage. App. at 41. There is no allegation of injury to tangible property, leaving loss of use of tangible property as the only possible avenue that might cover the breach of contract claim. However, the Richards Lawsuit claim does not fit within this definition either because the term “loss of use” implies an ownership interest in the property at issue. Here, Richards did not have an ownership interest in the property sold at the Sheriff’s sale. Richards attended the Sheriff’s sale in an effort to make a contract to obtain an ownership interest in the land, but was unsuccessful. Therefore, the breach of contract claim of the Richards Lawsuit is not within the coverage of the insurance policy that Arch issued to the County.

Where the cause of action asserted against the insured is not covered by the insurance policy, the policy also excludes the duty to defend. Specifically, the policy provides that:

[W]e will have no duty to defend the insured against any “suit” seeking damages for “bodily injury” or “property damage” to which this insurance does not apply.

Appellant’s App. at 27.

Based on our analysis, we reverse and remand to the trial court to vacate its order for declaratory judgment in favor of the County and to enter declaratory judgment in favor of Arch on its counterclaim.

Conclusion

The trial court did not abuse its discretion in denying Arch’s motion for default

judgment on the counterclaim and choosing to decide the case on the merits. The Richards Lawsuit only alleges a claim under the theory of breach of contract. Such a claim is not covered under the insurance policy issued by Arch to the County, because the underlying complaint does not allege damages of personal or bodily injury or property damage. Therefore, based upon the contentions contained in the Richards Lawsuit, Arch does not have a duty to defend.

Reversed and remanded.

VAIDIK, J., and BARNES, J., concur.